

No. 13-18-00486-CV

IN THE THIRTEENTH COURT OF APPEALS

CALHOUN PORT AUTHORITY,
Defendant/Appellant,

v.

VICTORIA ADVOCATE PUBLISHING CO.,
Plaintiff/Appellee.

Appealed from 135th District Court
Calhoun County, Texas
Cause No. 2018-CV-3354-DC
Hon. Robert E. Bell

**VICTORIA ADVOCATE PUBLISHING CO.’S
EMERGENCY MOTION
FOR TEMPORARY ORDERS**

Pursuant to TEX. R. APP. P. 29.3, Plaintiff/Appellee Victoria Advocate Publishing Co. (“the Advocate”) request that this Court enter emergency temporary orders pending a decision on this interlocutory appeal, and would respectfully show:

This is an interlocutory appeal by the Calhoun Port Authority (“CPA”). It is

automatically accelerated, TEX. R. APP. P. 28.1(a), and because it is accelerated, it automatically has precedence and should be decided sooner than cases that do not have precedence, *id.* at 40.1.

The appeal has come to the Court in the following manner. The CPA published a notice for a meeting of its board of commissioners to be held on May 9 (all dates are 2018). The notice (1CR 11) contained no mention of any deliberations (in open or closed session) regarding the CPA's intent to deliberate hiring former U.S. Representative Blake Farenthold as a full-time employee to serve as legislative liaison.

At the meeting, without adequate notice to the public, the CPA's commissioners entered a closed session, where they deliberated the hiring at the salary of \$13,333.33 per month. After the closed session, the chair of the CPA's board of commissioners said—as recorded in the meeting minutes—to the CPA's port director (i.e., its chief executive) that he was “directed to ... to proceed with hiring the person discussed in Closed Session.” (1CR 202.) Again, the agenda had not given any notice of who “the person” was, or what position “the person” would be filling. The CPA then hired Mr. Farenthold, without any written contract (a previous written draft served as the model for the final, unwritten agreement), at a salary of \$13,333.33. per month.

The Advocate promptly brought suit, as amended, primarily on the ground that the meeting notice of the closed session for the undisclosed purpose of deliberating the hiring of Mr. Farenthold was unlawful under the Texas Open Meetings Act, so the board’s “direct[ive] to hire the person discussed in closed session” was also unlawful and, consequently, voidable. The case was set the case for trial on August 6, 2018. (1CR 168.)

The CPA sought to bar all discovery (1CR 63) and to delay the trial date (1CR 168). The trial court denied the motion to prohibit discovery (1CR 281), but granted the Port a continuance until September 10, 2018 (1CR 292 at ¶ 3). The CPA then sought mandamus in this Court, which was promptly denied on July 26, 2018. *In re Calhoun Port Authority*, No. 13-18-00405-CV (Tex. App.–Corpus Christi July 26, 2018) (mem.) After a brief discovery period, the CPA filed a plea to the jurisdiction (and then an amended plea, after the Advocate’s filed its final amended petition). Both were denied, and the CPA filed its interlocutory appeal on September 5, which automatically continued the trial date of September 10. As explained in the Advocate’s brief on the merits, filed this same date, many of the CPA’s jurisdictional arguments implicate disputed facts that are central to the merits. Under the holdings of *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004), the trial court had no authority to resolve these facts

by granting the CPA's plea, and neither does this Court. Its other arguments are equally defective.

Nonetheless, the CPA filed this interlocutory appeal, which delays a decision on the merits and continues the bleeding of the \$13,333.33 per month the taxpayers are paying Mr. Farenthold. The CPA's strategy has been to drag this litigation out as long as it can to delay a final judgment reversing the hiring of Mr. Farenthold. The case would have been tried in September and appealed to this Court by Thanksgiving had this interlocutory appeal not been filed.

The Advocate attempted to confer with the CPA regarding an agreement to escrow funds pending a final judgment in this litigation. The CPA's counsel never addressed it, even after prompting in a second email. (Exhibit A.) The Advocate also sought the CPA's agreement to dispense with oral argument as a further means of the expediting it the appeal. The CPA declined (Exhibit A), and it has requested oral argument in its brief (which, true to form, it sought an extension for filing). The Advocate's brief asks that the Court not grant oral argument.

Under these circumstances, the Advocate and the public suffer irreparable harm by the repeated delays caused by the CPA: the taxpayer funds paid to Mr. Farenthold as salary, which are increasing by the month, cannot be recouped from him if his hiring is judicially voided (he is not a party to the litigation). On the

other hand, if this Court stays those payments, then in the unlikely event the Port prevails, it can still pay Mr. Farenthold. The Advocate respectfully believes the CPA's interlocutory appeal improperly glosses over genuine factual disputes that *Miranda* clearly prohibited the trial court from resolving in the CPA's favor by granting its plea, and delays relief to which the Open Meetings Act entitles the Advocate for the CPA's violations. Hence, the Advocate requests that this Court enter a temporary order staying the payments made to Mr. Farenthold as a result of his hiring following Appellee's May 9, 2018 board meeting.

Prayer for Relief

The Court should enter a temporary order staying the payments made to Mr. Farenthold as a result of his hiring following the CPA board's May 9 meeting, pending further orders of the Court. In addition, the Advocate respectfully asks the Court to afford this appeal all the precedence it can.

Date: December 4, 2018

Respectfully submitted,

MAREK, GRIFFIN & KNAUPP
Post Office Box 2329
203 N. Liberty Street
Victoria, Texas 77902
(361) 573-5500 [telephone]
(361) 573-5040 [facsimile]

By: /s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.
State Bar No. 24051839
John W. Griffin
State Bar No. 08460300

ATTORNEYS FOR
PLAINTIFF/APPELLEE
VICTORIA ADVOCATE
PUBLISHING CO.

Certificate of Conference

I certify that I attempted to confer with the CPA regarding an agreement to escrow funds pending a final judgment in this litigation. Counsel's email is attached as Exhibit A, but the CPA's counsel did not respond to the attempt.

/s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.

Certificate of Service

I certify that the foregoing has been served on Calhoun Port Authority, by electronic service through its counsel of record shown below, on this 4th day of December 2018:

Bill Cobb, bill@cobbxcounsel.com
Matthew Ploeger, matt@cobbxcounsel.com
Jenny Lee Smith, jenny@cobbxcounsel.com
Carly Barton, carly@cobbxcounsel.com
Cobb and Counsel
401 Congress Avenue, Suite 1540
Austin, TX 78701

/s/ Robert E. McKnight, Jr.
Robert E. McKnight, Jr.

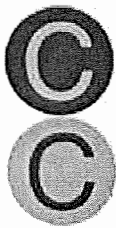
Robert McKnight

From: Jenny Lee Smith
Sent: Tuesday, October 9, 2018 3:51 PM
To: Robert McKnight
Cc: John Griffin; Bill Cobb
Subject: RE: Calhoun Port Authority Appellant Brief

Robert:

We are opposed to a Motion to Expedite.

Jenny



Jenny Lee Smith

Cobb & Counsel

401 Congress Ave., Suite 1540, Austin, Texas 78701

P: 512-693-7571 E: jenny@cobbxcounsel.com

W: www.cobbxcounsel.com



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From: Robert McKnight <mcknightr@lawmgk.com>
Sent: Tuesday, October 9, 2018 2:05 PM
To: Jenny Lee Smith <jenny@cobbxcounsel.com>
Cc: John Griffin <jwg@lawmgk.com>; Bill Cobb <bill@cobbxcounsel.com>
Subject: FW: Calhoun Port Authority Appellant Brief

Jenny -- We're opposed for reasons we'll explain in our opposition, but we also have a second question for you: **Would you oppose a motion to expedite the appeal (beyond the norm for an interlocutory appeal) once all the briefs are submitted, to include a decision without oral argument?** The first question, which we raised a couple of weeks ago, was about the **possibility of your client agreeing to escrow payments to Mr. Farenthold pending resolution of the underlying suit, but we did not receive any reply or acknowledgment of this email.** In any event, please let us your position on our second question.

Bob

Robert E. McKnight, Jr.
Of Counsel
Marek, Griffin & Knaupp
203 N. Liberty Street
Victoria, Texas 77901
(361) 573-5500
(361) 573-5040 (fax)

Exhibit A
Emergency Motion for Temporary Orders

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Subject:Calhoun Port Authority Appellant Brief

Date:Mon, 8 Oct 2018 20:15:32 +0000

From:Jenny Lee Smith <jenny@cobbxcounsel.com>

To:John W. Griffin <jwg@lawmgk.com>

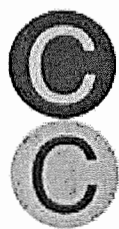
CC:Bill Cobb <bill@cobbxcounsel.com>

John,

Calhoun Port Authority's appellate brief is currently due October 15. Because of other pending matters and deadlines, we will be seeking an extension of thirty days for this brief. Please let me know whether you are opposed or unopposed to this extension request.

Thanks,

Jenny



Jenny Lee Smith

Cobb & Counsel

401 Congress Ave., Suite 1540, Austin, Texas 78701

P: 512-693-7571 E: jenny@cobbxcounsel.com

W: www.cobbxcounsel.com



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Robert McKnight

From: Robert McKnight
Sent: Tuesday, September 18, 2018 3:23 PM
To: "Bill Cobb"
Cc: John Griffin
Subject: VICAD/CPA

Bill – Will the port agree to withhold the monthly \$13,333 payments to Mr. Farenthold pending disposition of this suit, since there is no way to reimburse the public for funds paid to Mr. Farenthold while it's pending? If the port prevails, it can pay Mr. Farenthold those funds, and if the hiring is voided or reversed, then the port could retain those funds for the benefit of the public. Thanks for letting us know your position on this.

Thanks,
Bob

Robert E. McKnight, Jr.
Of Counsel
Marek, Griffin & Knaupp
203 N. Liberty Street
Victoria, Texas 77901
(361) 573-5500
(361) 573-5040 (fax)

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